(11)

IN THE

Supreme Court of the United States

October Term, 1941

Number 274

MASSMAN CONSTRUCTION COMPANY, Petitioner and Appellee below,

vs.

HARRY W. BASSETT, Deputy Commissioner of the United States Employees' Compensation Commission, Myrtle Boling, Arline Boling, Delores [illegible] and Bonnie Boling Williams, Respondents and Appellants below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS

WALTER [illegible]
Counsel for Petitioner
Honolulu, T. H.

ROY W. [illegible]
907 [illegible]
Kansas City, Mo.

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—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOR THE EIGHTH CIRCUIT

—o—

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

—o—

YOUR PETITIONER, MASSMAN CONSTRUCTION COMPANY, A MISSOURI CORPORATION, RESPECTFULLY SHOWS THE COURT:—

I

SUMMARY STATEMENT OF THE MATTERS INVOLVED

The decision of the United States Circuit Court of Appeals for the Eighth Circuit, review of which is here sought, was rendered in the case of Harry W. Bassett, Deputy Commis-

sioner, etc., et al, appellants vs. Massman Construction Company, appellee (Number 11,800 in that court). Said case was a suit by injunction to set aside an award under the Longshoremen's and Harbor Workers' Compensation Act (Title 33, Section 901—950 U. S. C. A.) made by the United States Employees' Compensation Commission.

During 1937 petitioner built a dam for the Federal Government across the Mississippi River from Saverton, Ralls County, Missouri, to a corresponding point in Pike County, Illinois. One Harold Reid Boling was employed by petitioner as a carpenter's helper in said work (R. 42).* On May 27, 1937, said Boling was working on one of the concrete piers of the permanent dam at a point inside of a coffer-dam from which all the waters of the river had been withdrawn. (R. 17, 31, 75.) He was stripping away the wooden forms into which the concrete piers had been poured (R. 37). He cut his hand. Infection set in and some days later he died at a hospital located in Hannibal, Marion County, Missouri (R. 60), from scarlet fever, alleged to be the result of said accidental injury and infection arising therefrom.

Boling's widow and minor children filed a claim under the Longshoremen's and Harbor Workers' Compensation Act (Title 33, U. S. C. A., Sections 901-950) with the United States Employees' Compensation Commission (hereinafter called the commission). On February 25, 1939, respondent Bassett, a deputy of said commission, made an award in favor of the claimants (R. 58-60). Within thirty days thereafter petitioner filed this suit in the District Court for the Northern Division of the Eastern District of Missouri seeking to have the award set aside under Section 921, Title 33, U. S. C. A. (R 4-10). The attack made upon the award was on the following grounds:

[*Footnote: Page numbers herein refer to the printed transcript of the record.]

(1) That the accident did not happen on navigable waters of the United States, but inside a cofferdam from which all waters had been withdrawn, and at a point which had been permanently withdrawn from navigation; (2) that Boling's employment was non-maritime; (3) that the contract of his employer, upon which he was engaged, was not a maritime contract but one made on land, to be performed on land, by employees engaged in non-maritime occupations or pursuits and one of local nature and character; (5) that regulation of the matter involved by the State would work no material prejudice to any characteristic feature of the general maritime law. Hence, it was claimed that the Act by its own terms did not apply to Boling's death (Sec. 903, Title 33, U. S. C. A.) and under the limitations of admiralty power laid down by this court could not constitutionally so apply.

None of the defendants, by answer or otherwise, raised any question concerning the propriety of bringing this suit in the District Court for the Northern Division of the Eastern District of Missouri (R. 10-13). To the bill of complaint filed therein by this petitioner, the defendant Bassett, Commissioner, filed a general answer to the merits. He not only did not deny the jurisdiction of the court on the ground of venue, but he specifically admitted in his answer that sitting as a Commissioner in the case he had found that the accident occurred in the above mentioned division and district. (R. p. 11, par. 2—p. 4, p. 2).

The other defendants joined in the answer filed by Bassett and adopted it as their own (R. p. 13). All parties voluntarily went to trial on the merits in said court.

The District Court found for petitioner and adjudged that the award be set aside (R. 140). His opinion is reported in 30 Fed. Sup. 813. Separate findings of fact and conclusions of law made by the District Judge are set out (R. 135). The

Deputy Commissioner, Bassett, and the claimants appealed to the Circuit Court of Appeals for the Eighth Circuit. That court made no findings on the merits of the case, but reversed the District Court on a ground not raised below. It found: that the accident which caused the infection from which Boling died happened east of the center line of the channel of the Mississippi as it "existed before any construction work in the river, and also at the time of the injury;" (but made no finding as to the location of said line in 1910 when the boundaries of the District were defined Sec. 171, Title 28, U. S. C. A.); that Section 921 *supra* required a suit to review to be brought in the District "in which the injury occurred;" that this requirement "is not merely one of venue, but is jurisdictional;" and that the acts of Congress giving the States of Missouri and Illinois *concurrent* jurisdiction over the river (3 Statutes at Large 545 and 3 Statutes at Large 429) did not apply to Federal Courts sitting within those States.

Petitioner filed a timely motion for rehearing and also by leave of court an additional suggestion in support thereof. By the latter it called attention to the fact that in a death case, such as the case at bar, the word "injury" used in Section 921 of the Act meant injury or death because the term "injury" is so defined by Congress in the Act itself (Section 902, sub-section 2), and that Congress had in the Act provided independent relief and procedure for cases in which death ensues separate from those applicable in cases of injury not causing death. That, therefore, in a death case the place of injury within the meaning of Section 921 was the place at which the death occurred, and not the place at which the accident causing death occurred, and that in this case it was admitted that decedent died at Hannibal, Missouri, within the Northern Division of the Eastern District of that State. The Circuit Court of Appeals denied a rehearing (R. 169).